

## **The Honorable Ronald B. Leighton**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

**FEDERATED RURAL ELECTRIC  
INSURANCE EXCHANGE and TIG  
INSURANCE COMPANY,**

## **Plaintiffs,**

V.

**PUBLIC UTILITY DISTRICT NO. 1 OF  
COWLITZ COUNTY, WASHINGTON, a  
Washington municipal corporation,**

## Defendant.

**NO. CV04-05052 RBL**

**DEFENDANT PUD'S, MOTION FOR  
ATTORNEY FEES, PREJUDGMENT  
INTEREST AND OTHER DAMAGES**

**Noted: June 14, 2007**

## **Introduction & Background**

On April 21, 2002, the Defendant Public Utility District No. 1 of Cowlitz County, Washington (the “District” or “PUD”) suffered a catastrophic loss to its Swift No. 2 project when a large sinkhole collapsed in the canal’s forebay. The District notified all of its insurers of the loss. The District’s DIC insurers, Lexington and Lloyd’s, promptly accepted coverage and paid their policy limits. However, the District’s All Risk property excess insurer, TIG, investigated for over two years before ultimately denying the claim.

Contemporaneously with its coverage denial, TIG filed suit against the District seeking a “no coverage” ruling. Initially, TIG argued that the policy excluded earth movement (**including** a sinkhole collapse). But in July 2004, the Court rejected TIG’s argument and held,

1 as a matter of law, that TIG insured damages caused by the peril of sinkhole collapse. TIG then  
 2 argued, after almost two years of discovery, that the cause of loss was the excluded peril of  
 3 earth movement, not sinkhole collapse. But in March 2006, the Court rejected TIG's argument  
 4 and held, as a matter of law, that the loss' proximate cause was a sinkhole collapse.

5 When those two arguments failed, TIG attacked the District's damages and argued that  
 6 the District spent too much money, the repairs took too long, and that the District's covered  
 7 loss fell below \$95,000,000. In attacking the District's damages, TIG challenged the scope of  
 8 the District's code upgrade and business interruption coverage under the DIC policies. Thus,  
 9 TIG continued to disclaim coverage on the basis that the District's total insured loss fell below  
 10 TIG's \$75,000,000 xs \$25,000,000 layer.<sup>1</sup>

11 In September 2006, the Court resolved some of these coverage issues in the District's  
 12 favor.<sup>2</sup> The Court also ordered the parties to Appraisal to determine the loss' quantum. And, in  
 13 April 2007, the Appraisal Panel calculated the District's total loss at \$125,497,225 (only  
 14 \$300,000 less than the District's claim) thereby obliterating TIG's argument regarding the  
 15 magnitude of the District's insured loss. Overall, in order to avoid paying the District for its  
 16 losses, TIG unsuccessfully asserted three different coverage arguments.

17 Currently before the Court is the District's "Motion to Enter Judgment Against TIG  
 18 Pursuant to the Appraisal Findings." That motion seeks \$30,397,225 from TIG for its direct  
 19 damages as a result of the April 21, 2002 loss. In addition, the District now seeks attorneys'  
 20 fees, prejudgment interest, and other damages as a result of TIG's wrongful coverage denial  
 21 and breach of contract. Specifically, the District seeks the following:

- 22 1. Attorneys' fees and expenses for proving coverage.

23  
 24 <sup>1</sup> In fact, TIG still continues to challenge coverage in its Motion for Summary Judgment and Alternative Motion  
 25 for Summary Judgment [Document No. 249].

<sup>2</sup> See Court's September 19, 2006 Order resolving code upgrade and business interruption coverage issues  
 [Document No. 220].

- 1        2. The cost to collect insurance proceeds from TIG.
- 2        3. A ruling that TIG's "ultimate net loss" should take into consideration the costs that  
3           the District incurred to effect the \$95,000,000 recovery that TIG claims as a credit  
4           against the District's "actual loss sustained" of \$125,497,225. Such a ruling would  
4           increase the amount TIG owes from \$30,397,225 to \$39,658,565.
- 5        4. Prejudgment interest on the \$30,397,225 TIG owes the District.

6 In determining these issues, the Court should consider the following principles and facts:

- 7        • TIG wrongfully denied coverage.
- 8        • To establish coverage, the District incurred legal fees and expenses exceeding two  
9           million dollars.
- 10      • The District is entitled to maximize its insurance recovery.
- 11      • TIG has refused to accept coverage for the District's insured loss for more than  
11           five years. In fact, TIG has filed a motion seeking a ruling that it owes nothing on  
12           the basis that TIG's excess policy has not yet been triggered. And,
- 13      • The District is only asking to be put in the same financial position it would have  
13           been in had TIG not breached the insurance contract.

14     We discuss in more detail below the District's entitlement to attorneys' fees,  
15     prejudgment interest, and other damages as a result of TIG's wrongful coverage denial and  
16     breach of contract.

17     **I. The District is Entitled to Recover its Attorneys' Fees & Expenses for Proving  
18       Coverage As a Matter of Law**

19     Well settled Washington law holds that forcing an insured "to file suit to obtain the  
20     benefit of their insurance contract" **entitles** them to recover attorneys' fees.<sup>3</sup> The rationale for  
21     awarding attorneys' fees as compensation is explained in Olympic Steamship Co., Inc. v.  
22     Centennial Insurance Co.<sup>4</sup> where the Washington Supreme Court stated:

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25     <sup>3</sup> Olympic Steamship Co., Inc. v. Centennial Ins. Co., 117 Wash.2d 37, 52-53, 811 P.2d 673, 681 (1991);  
McGreevy v. Oregon Mutual Ins. Co., 90 Wash.App. 283, 951 P.2d 798 (1998).

<sup>4</sup> 117 Wash.2d 37, 52-53, 811 P.2d 673, 681 (1991).

1           When an insured purchases a contract of insurance, it seeks  
 2           protection from expenses arising from litigation, not ‘vexatious,  
 3           time-consuming, expensive litigation with his insurer.’<sup>5</sup>

4           The above shows Washington’s public policy seeks to curb vexatious, time consuming, and  
 5           expensive litigation with insurers. The Olympic Steamship Court also reasoned that “allowing  
 6           an award of attorney fees will encourage the prompt payment of claims.”<sup>6</sup> In addition,  
 7           Washington awards attorneys’ fees to “make the insured whole.”<sup>7</sup>

8           In this case, TIG denied coverage and filed suit against the District seeking a “no  
 9           coverage” ruling on the basis that an excluded peril caused the loss and that there was no  
 10          coverage under TIG’s policy.<sup>8</sup> The Court, however, rejected TIG’s argument in three different  
 11          rulings. First, in July 2004, the Court held, as a matter of law, that TIG insured the peril of  
 12          sinkhole collapse.<sup>9</sup> Second, in March 2006, this Court determined that the proximate cause of  
 13          the loss was a sinkhole collapse.<sup>10</sup> Third, in September 2006, this Court determined that the  
 14          District was entitled to recover for FERC required code upgrades and 100% of its business  
 15          income loss.<sup>11</sup> These three decisions meant that TIG incorrectly denied coverage.

16           As a result of TIG’s coverage denial and contract breach, the District was forced to  
 17          retain counsel, expert witnesses, and consultants in order to “obtain the benefit of its insurance  
 18          contract” and defend “vexatious, time consuming, and expensive litigation.” In view of the  
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21           <sup>5</sup> *Id.*

22           <sup>6</sup> *Id.*

23           <sup>7</sup> Panorama Village Condominium Owners Assoc. Board of Directors v. Allstate Insurance Co., 144 Wash.2d 130,  
 24           142, 26 P.3d 910, 916 (2001).

25           <sup>8</sup> See Federated Rural Electric Insurance Exchange’s and TIG Insurance Company’s Complaint for Declaratory  
 26          Relief at ¶3.9 [Document No. 1].

27           <sup>9</sup> See Court’s July 21, 2004 Order [Document No. 35].

28           <sup>10</sup> See Court March 3, 2006 Order [Document No. 173].

29           <sup>11</sup> See Court’s September 19, 2006 Order [Document No. 220].

1 holding in Olympic Steamship Co., Inc., the District is **entitled** to recover the attorneys' fees  
 2 incurred in proving coverage.<sup>12</sup>

3 In determining the amount of the fee award, the Court has independent and broad  
 4 discretion to award a "reasonable fee."<sup>13</sup> Generally, courts apply the "lodestar" method to  
 5 arrive at a "reasonable fee."<sup>14</sup> "The lodestar award is arrived at by multiplying a *reasonable*  
 6 hourly rate by the number of hours reasonably expended."<sup>15</sup>

7 In this case, the District retained Bruckmann & Victory, LLP's and Kingman Peabody  
 8 Fitzharris & Ringer to litigate against TIG. As the attached documentation evidences, the  
 9 District identifies the rates and numbers of hours worked for specific tasks by each attorney.  
 10 The attached documentation also describes the type of work performed by Bruckmann &  
 11 Victory and Kingman Peabody Fitzharris & Ringer. Multiplying these two numbers (counsel's'  
 12 reasonable rates and counsel's reasonable hours worked) generates a lodestar fee of \$960,348.<sup>16</sup>

13 Both law firms had reasonable hourly rates and worked a reasonable number of hours  
 14 on the case. First, counsels' hourly rates were "reasonable" because they charged the District  
 15 their established billing rates.<sup>17</sup> And, Washington holds that "when attorneys have an  
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19 12 The District maintains that it is entitled to recover for attorneys' fees and expenses from February 4, 2002 to  
 20 date because TIG continues to challenge coverage and the extent of the benefit provided under its policy. See  
 21 Philips Oral Healthcare, Inc. v. Federal Ins. Co., 2005 WL 3020014 \*4 (W.D. Wash.) (holding that disputes over  
 22 the extent of benefits provided by an insurance policy including "allocation issues" fall under the rubric of  
 23 coverage not valuation.).

24 13 See McGreevy, 90 Wash. App. 283, 951 P.2d 798.

25 14 Id.

15 Id. (Emphasis in the original).

16 The District submits documentation for its incurred attorneys' fees from February 4, 2004 through July 2006.  
 17 Since TIG still challenges coverage, the District is requesting attorneys' fees and expenses from August 2006 to  
 18 date. However, the District has not been able to quantify the fees and expenses for this time period because the  
 19 case is ongoing. If the Court determines that the District is entitled to fees from August 2006 to date, the District  
 20 requests that it be allowed to submit supporting documentation at the case's conclusion.

21 17 See Exhibit A attached to Declaration of Jennifer A. Hoffman (hereinafter "Hoffman Decl.").

1 established rate for billing clients, that rate will likely be a reasonable rate.”<sup>18</sup> Accordingly, this  
 2 Court should determine that counsels’ rates are “reasonable.”<sup>19</sup>

3 Second, counsels’ rates are consistent with Rule of Professional Conduct 1.5(a).  
 4 Specifically, RPC 1.5(a) considers, *inter alia*, the following factors in determining whether a  
 5 fee is reasonable:

- 6     • The time and labor required, novelty and difficulty of questions involved, the  
     skill requisite to perform the legal service properly . . .
- 7     • Experience, reputation, and ability of the lawyer or lawyers performing the  
     services.
- 8     • Amount involved in the matter on which legal services are rendered and the  
     results obtained;<sup>20</sup>

9 In this case, counsels’ rates and time spent are reasonable because:

- 12     • The parties engaged in lengthy discovery for over three years.
- 13     • Counsel participated in over forty expert and fact depositions.
- 14     • Counsel reviewed over 100,000 documents produced during discovery.
- 15     • Counsel filed and opposed several summary judgment motions on a variety of  
     issues.
- 17     • The case involved scientifically complex issues and required analysis of  
     testimony from several hydroelectrical and geotechnical engineers.
- 18     • TIG retained Bullivant Houser Bailey. Thus, the District retained counsel that  
     could rival Bullivant Houser Bailey’s experience, reputation and ability.

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22     <sup>18</sup> See Bowers v. Transamerica Title Ins. Co., 100 Wash. 2d 581, 675 P.2d 193 (1983). We note that the Court can  
 23 also consider opposing counsel’s hourly rates. Absher Constr. Co. v. Kent Sch. Dist., 79 Wash. App. 841, 848, 917  
 24 P.2d 1086 (1995).

25     <sup>19</sup> Washington does not require “[a]n explicit hour-by-hour analysis of each lawyer’s time sheets . . . .” Absher  
Constr. Co., 79 Wash. App. at 848, 917 P.2d 1086. At a minimum, the documentation needs to include (1) the  
 number of hours worked; (2) the type of work performed; and (3) the category of attorney who performed the  
 work. See Bowers, 100 Wash. 2d at 597, 675 P.2d 193.

20 See also Banuelos v. TSA Washington, Inc., 134 Wash. App. 607, 615, 141 P.3d 652 (2006).

- 1     • The District successfully argued three summary judgment motions and defeated  
TIG's **several** subsequent motions for reconsideration.
- 2     • The District successfully proved damages of \$125,497,225 of which TIG owes  
\$30,397,225.

4     In view of the above, this Court should determine that counsels' rates and time spent was  
5     "reasonable."

6                   **A. The District is Entitled to Recover Expenses Incurred to Establish Coverage**

7     In addition to recovering attorneys' fees, the District can also recover other necessary  
8     expenses of litigation such as expert witness fees incurred to prove and establish coverage.<sup>21</sup>  
9     For example, in Panorama Village Condominium Owners Assoc. Board of Directors v. Allstate  
10    Insurance Co., the insured filed suit against its property insurer for wrongfully denying  
11    coverage for hidden decay to its condominium. The insured retained an expert witness to help  
12    prove coverage and sought recovery of those fees.

13    The trial court included the expert fees as part of the recoverable attorneys' fees. But  
14    the Court of Appeals reversed that ruling and disallowed the expert witness fees. The  
15    Washington Supreme Court reversed the Court of Appeals and upheld the trial court's award of  
16    expert fees as part of the insured's recoverable expense. In so holding, the Panorama court  
17    stated:

18                  To make such plaintiffs whole, 'reasonable attorney fees' must,  
19                  by necessity, contemplate expenses other than merely the hours  
20                  billed by an attorney. The insured must therefore be  
21                  compensated for **all** of the expenses to establish coverage as part  
22                  of those attorney fees which are reasonable.<sup>22</sup>

23    The above holding entitles the District to recover **all** of the expenses it incurred to establish  
24    coverage as part of its attorneys' fees, including expert witness fees.

25    <sup>21</sup> See Panorama Village Condominium Owners Assoc. Board of Directors, 144 Wash.2d at 142, 26 P.3d 910  
(2001).

<sup>22</sup> Id at 144, 26 P.3d 910 (Emphasis in the original).

1       Here, the District retained five experts and consultants to assist it with establishing  
 2 coverage. Specifically, the District spent \$629,881 from February 4, 2004 through July 2006  
 3 for the following five experts and consultants:

Consultant	Purpose	Total Invoiced from February 4, 2004 through July 2006
Zipper Zeman Associates, Inc.	Cause of loss expert	\$81,320.08
JRP Engineering, Inc.	Construction consultant	\$9,952.41
CDK Construction, Inc.	Construction consultant	\$7,631.25
EES Consulting	Business Income Loss expert	\$77,819.63
McLarens Young International	District's adjuster	\$163,828.33
Doug G. Peterson & Associates Inc.	Machinery & Equipment Consultant	\$42,805.32
RGL Forensic Accountants	Accounting experts	\$246,524.70
<b>TOTAL</b>		<b>\$629,881.72</b>

16     The above chart shows that the District spent \$629,881 for its seven experts and consultants. In  
 17 addition, the District also incurred \$64,253 for other litigation expenses.<sup>23</sup>

18     In summary, the evidence demonstrates that TIG incorrectly denied the District's claim  
 19 and breached the insurance contract. That incorrect denial and contract breach forced the  
 20 District to litigate for over three years. As a result, the District incurred attorneys' fees and  
 21 expenses that exceed \$2,000,000. The District is entitled to recover these attorneys' fees and  
 22 expenses in order to be made whole as a result of TIG's incorrect denial. Accordingly, the  
 23 District requests that this Court enter judgment against TIG for attorneys' fees and expenses.

24     <sup>23</sup> This figure includes \$12,843 in computerized legal research fees, which is also a recoverable expense. See  
 25 Absher, 79 Wash. App. at 848, 917 P.2d 1086. It also includes reasonable and necessary transportation, lodging,  
 food and telephone expenses. See Condominium Owners Assoc. Board of Directors, 144 Wash.2d at 143, 26 P.3d  
 910 (2001) citing Palmigiano v. Garrahy, 707 F.2d 636 (1<sup>st</sup> Cir. 1983).

1 In this regard, the District submits documentation for attorneys' fees and expenses from  
 2 February 4, 2004 to July 2006 totaling \$1,655,083.41. As the case is ongoing, the District  
 3 requests that it be allowed to submit supporting documentation for time incurred from August  
 4 2006 to date at the case's conclusion.

5 **II. The District is Entitled to Recover All Damages Incurred As a Result of TIG's  
 6 Breach of Contract**

7 The District has already established that TIG's April 21, 2002 coverage denial breached  
 8 the insurance contract. Thus, in addition to TIG's payment for the direct damages the District  
 9 incurred in repairing Swift No. 2, the District is also entitled to other damages that make it  
 10 whole. Specifically, TIG is responsible for the following:

- 11 • All damages that naturally flow from TIG's breach of contract; and
- 12 • Lost opportunity costs

13 We discuss below the District's damages in more detail.

14 **A. The District is Entitled to Recover All Damages that Naturally Flow from  
 15 TIG's Breach of Contract**

16 In Washington, a breaching party is responsible for all damages that naturally flow from  
 17 a contract breach.<sup>24</sup> The purpose of awarding damages is to place the aggrieved party in the  
 18 "same economic position he would have been in if the contract had been performed."<sup>25</sup> These  
 19 damages are commonly referred to as "expectation damages." In this case, the cost the  
 20 District incurred in recovering the insurance proceeds from TIG constitutes "expectation  
 21 damages."

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 25<sup>24</sup> See Floor Express, Inc. v. Daly, -P.3d -, 2007 WL 1470591 \*2 (Wash.App. Div. 2); 25 Wash. Prac., Contract  
 law And Practice §14.4.

<sup>25</sup> Id.; 25 Wash.Prac. Contract Law And Practice at §14.3.

1           Specifically, TIG's coverage denial and declaratory judgment action put the District, a  
 2 non-profit public utility, in an unfortunate and difficult position. Specifically, the District had  
 3 to cope with the following double whammy:

- 4           • Find the resources to repair Swift No. 2; and  
 5           • Litigate a protracted and expensive coverage dispute for an unknown and  
 6           indefinite period of time.

7 Faced with the above double whammy, the District borrowed funds to effect repairs and  
 8 entered into an agreement with Lloyds whereby Lloyds agreed to front all litigation costs.<sup>26</sup>  
 9 Lloyd's also allowed the District the use of Lloyd's consultants, experts, and counsel to litigate  
 10 against TIG. In exchange for fronting the litigation costs, the District agreed to pay Lloyd's  
 11 40% of any recovery.<sup>27</sup>

12           This agreement with Lloyds offered relief from the double whammy for several reasons.  
 13 First, the District had virtually no prior insurance losses or experience litigating a complex  
 14 coverage dispute. Thus, the District received the benefit of having Lloyd's consultants,  
 15 experts, and counsel. Second, from the start of this case, it was uncertain if the District would  
 16 be able to collect the full \$55,497,225 balance of its loss from Federated and TIG  
 17 (\$125,497,225 - \$70,000,000 payment from Lloyd's = \$55,497,225). Thus, the agreement  
 18 enabled the District to prosecute the case without putting a financial drain on its already limited  
 19 resources.

20           In April 2007, the Appraisal Panel determined that the District's damages totaled  
 21 \$125,497,225. Thus, TIG owes at least \$30,397,225.<sup>28</sup> Assuming the Court enters judgment  
 22 against TIG for this amount, the District will have to give Lloyd's 40% of the net recovery

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 24 <sup>26</sup> See Amended Loan Receipt Agreement attached as Exhibit B to Hoffman Declaration.

25 <sup>27</sup> Id.

<sup>28</sup> \$125,497,225 total appraised damages - \$70,000,000 from DIC carriers - \$25,000,000 from Federated - \$100,000 Federated deductible = \$30,397,225.

1 (\$12,158,890). This amount represents the District's "expectation damages" because this is the  
 2 amount TIG needs to pay the District in order to put the District in the same economic position  
 3 that it would have been in if TIG had honored the contract.

4 Obviously, if TIG had not breached its contract and sued the District, the District would  
 5 **not** have had to enter into such an agreement with Lloyd's. Thus, the \$12,158,890 the District  
 6 will have to give to Lloyd's constitutes a loss that naturally flows from TIG's breach. The  
 7 District should be able to recover this amount from TIG in order to put it in the same economic  
 8 position it would have been if TIG had honored the insurance contract. In view of the  
 9 foregoing, this Court should subscribe to the general rules governing damages and hold that  
 10 TIG is responsible for additional damages to the District as a result of its breach of contract.

11 **B. The District is Entitled to Recover its Lost Opportunity Costs**

12 As discussed above, the District is entitled to recover from TIG the money it will have  
 13 to give Lloyd's as a consequence of TIG's breach of contract. Moreover, the Court can  
 14 properly characterize these damages as lost opportunity costs, which are recoverable in  
 15 Washington.

16 Lost opportunity costs represent the value of what a party could have done with its  
 17 assets if the breach did not occur. Thus, lost opportunity costs sometimes concern lost income  
 18 the party would have earned if they did not have to take the money out of its pocket to effect  
 19 repairs.

20 For example, in Washington Public Power Supply System v. General Electric Co.<sup>29</sup>  
 21 plaintiff WPPSS asserted that GE defectively designed a containment system. As a result,  
 22 WPPSS was required to retrofit the containment. The retrofit cost WPPSS approximately  
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25 <sup>29</sup> 1989 WL 306200 (E.D. Wash.).

1 \$297,000,000. Of this amount, WPPSS borrowed approximately \$229,000,000 by selling  
 2 bonds.

3 WPPSS used its own funds to meet its interest obligations on the bonds. And, WPPSS  
 4 sought the lost “opportunity cost” of having to use its own funds to pay interest instead of being  
 5 able to invest and earn interest.<sup>30</sup>

6 The Washington Supreme Court held that it would permit an award of damages for the  
 7 lost opportunity (i.e., cost of capital) if the plaintiff could show, with reasonable certainty, the  
 8 following:

- 9           • when expenses were incurred,
- 10           • the amount outstanding during the period of delay, and
- 11           • what interest rate could have been earned.”<sup>31</sup>

12 The above factors allow a court to award “opportunity costs” because they can be determined  
 13 with reasonable certainty.

14 In WPPSS, the lost opportunity stemmed from WPPSS having to **give up** something of  
 15 value (i.e., its own cash to pay the interest on bonds.) Here, the District’s lost opportunity  
 16 stems from having to **give up** something of value (i.e., a contractual right to keep 100% of any  
 17 recovery from TIG for its breach of contract.) Thus, as a result of the breach of contract, both  
 18 WPPSS and the District had to give up something of value. In this regard, the following factors  
 19 will help the Court determine the value of that loss, with reasonable certainty:

- 20           • the amount given up (i.e., 40% of the net recovery) and
- 21           • the reasonableness of the Amended Loan Receipt Agreement.<sup>32</sup>

22 In this case, the District’s Amended Loan Receipt Agreement was reasonable because it  
 23 allowed the District to prosecute the case against TIG without putting additional strain on its

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 25<sup>30</sup> Id. at \*3.

<sup>31</sup> Id. at \*7.

<sup>32</sup> See Amended Loan Receipt Agreement attached as Exhibit B to Hoffman Declaration.

1 own limited resources. At the time the District and Lloyd's signed the Agreement, the amount  
 2 the District would be able to recover from TIG was unknown. Moreover, the District  
 3 understood that litigating against TIG would be a tremendous undertaking with respect to both  
 4 time and money. Thus, the Amended Loan Receipt Agreement allowed the District to recover  
 5 the majority of its losses without having to front any litigation costs.

6 In exchange, the District gave up the benefit of receiving 100% of any recovery from  
 7 TIG. Thus, the 40% that the District has to give Lloyd's is a lost opportunity cost, which the  
 8 District should be able to recover from TIG.

9           **III. The District's "Ultimate Net Loss" Should Include the Cost to Collect the**  
 10           **\$95,000,000 that TIG Claims as a Credit**

11           TIG's policy wording allows the District to recover the costs to collect the \$95,000,000  
 12 that TIG claims as an offset against the District's total "actual loss sustained" of \$125,497,225.  
 13 Specifically, TIG's policy defines "ultimate net loss" as follows:

14           "Ultimate net loss" shall mean the **actual loss sustained** by the  
 15 Insured as a direct result of the perils insured against by the  
 16 policy(ies) specified in Paragraph II. Primary/Underlying  
Insurance, after making deductions for: deductible(s) and/or other  
 17 self-insured retention(s) to be borne by the Insured, salvage  
 recoveries and all other recoveries except this Agreement.  
 (Emphasis added).<sup>33</sup>

18 The above definition means that the District's "ultimate net loss" is its "actual loss sustained"  
 19 after making deductions for Federated's \$100,000 deductible and "**all other recoveries.**"

20           In this case, the District's "ultimate net loss" can be calculated as follows:

	\$125,497,225	Actual loss sustained
-	\$100,000	Federated deductible
-	\$70,000,000	Recovery from Lloyds

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25           <sup>33</sup> Id.

1	-	<u>\$25,000,000</u>	Recovery from Federated
2	Subtotal	\$30,397,225	

3 However, in securing the recoveries, the District incurred a cost of \$9,261,340 (\$25,000,000  
 4 less \$1,846,649 litigation costs x 40% = \$9,261,340). And, this Court should consider this  
 5 \$9,261,340 cost in determining the District's "ultimate net loss."

6 In general, costs to obtain a recovery are typically deducted from the gross recovery.<sup>34</sup>  
 7 For example, in Various Underwriters at Lloyd's v. Theil,<sup>35</sup> the insured's helicopter crashed.  
 8 The insured was able to sell the salvaged wreckage for \$42,668. However, in doing so, the  
 9 insured incurred expenses of \$1,562 in retrieving, transporting and storing the salvage. These  
 10 costs were then deducted from the actual salvage recovery resulting in a "net" salvage recovery  
 11 of \$41,105.

12 In this case, TIG wants a \$95,000,000 credit for the Lloyd's and Federated payments.  
 13 But TIG's argument fails to acknowledge that the District had to incur an expense in order to  
 14 obtain those recoveries. Specifically, the District entered into an agreement with Lloyd's to  
 15 front the litigation costs. The agreement required the District to return as a cost, forty percent  
 16 of any recovery. As a result, when the District recovered \$25,000,000 from Federated it had to  
 17 give Lloyd's 40% of that award. Therefore, under TIG's agreement to indemnify the District  
 18 for its "ultimate net loss," TIG should only get a credit for the District's net recoveries of  
 19 \$85,738,660.

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 24 <sup>34</sup> See Various Underwriters at Lloyd's v. Theil, 578 F. Supp. 394 (D.C. Colo. 1984); Cassel v. Newark Ins. Co.,  
 25 79 N.W.2d 101,105-06 (Wis. 1956); International Ore & Fertilizer Corp. v. SGS Control Services, Inc., 828 F. Supp. 1098, 1109-1111 (S.D.N.Y. 1993).

<sup>35</sup> 578 F. Supp. 394 (D.C. Colo. 1984).

1       In view of the foregoing, TIG owes \$39,658,565<sup>36</sup> (\$125,497,225 - \$70,000,000  
 2 recovery from DIC carriers - \$25,000,000 settlement from Federated - \$100,000 Federated  
 3 deductible + \$9,261,340 expense to effect a recovery = \$39,658,565).

4       **IV. The District is Entitled to Prejudgment Interest**

5       From the onset of the litigation, the District advised TIG that its damages exceeded  
 6 \$125,000,000. In April 2007, the Appraisal Panel confirmed the District's position and  
 7 determined that the District's loss totaled \$125,497,225. After subtracting the gross  
 8 payments the District received from the DIC carriers and Federated, and Federated's  
 9 deductible, TIG's owes \$30,397,225. TIG has avoided paying this amount for several years.  
 10 Accordingly, the District seeks prejudgment interest on the amount owed.

11       TIG concedes that Washington "favors prejudgment interest."<sup>37</sup> The rationale for  
 12 awarding prejudgment interest is explained in Universal/Land Construction Co. v. City of  
 13 Spokane<sup>38</sup> where the court stated:

15       Prejudgment interest is favored in the law based on the premise  
 16       that he who retains money he should pay to another should be  
 17       charged interest on it.<sup>39</sup>

18       The above demonstrates Washington's public policy to penalize parties that wrongfully  
 19 withhold money from others.

20       Washington awards prejudgment interest in either of the following two  
 21 circumstances:<sup>40</sup>

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22       <sup>36</sup> Again, this figure does **not** take into account the \$1,670,349 in attorneys' fees that the District is seeking from  
 23 TIG under Point I.

24       <sup>37</sup> See TIG's Motion for Summary Judgment and Alternative Motion for Partial Summary Judgment at p. 22 line  
 25 20 [Document No. 249].

26       <sup>38</sup> 49 Wash. App. 634, 745 P.2d 53 (1987).

27       <sup>39</sup> Id. at 641, 745 P.2d 53.

28       <sup>40</sup> TIG correctly cites to prevailing Washington law concerning prejudgment interest.

- 1           • The amount due is determinable by computation with reliance to a fixed  
 2           standard contained in the contract without reference on opinion or discretion.<sup>41</sup>

3           **Or,**

- 4           • The amount claimed is “liquidated;”

5           A claim is liquidated where the evidence furnishes data that makes it possible to  
 6           compute the amount of damage with exactness.<sup>42</sup> “The fact that a claim is disputed does **not**  
 7           make it unliquidated.”<sup>43</sup>

8           Washington courts have held that actual invoices constitute sufficient evidence to  
 9           render a claim “liquidated.”<sup>44</sup> For example, in Weyerhaeuser Co. v. Commercial Union Ins.  
 10          Co.<sup>45</sup> the insurer disputed coverage and the amount of damage sustained in cleaning up  
 11          environmental waste. The jury returned a verdict in the insured’s favor. The insured then  
 12          argued it was entitled to prejudgment interest. To support its claim, the insured submitted  
 13          actual invoices for the cleanup work performed.

14          The Washington Supreme Court affirmed the trial court’s award of prejudgment interest  
 15          and held that the “damage amount was established or could be ascertained with certainty based  
 16          upon the facts before the court.”<sup>46</sup> Specifically, the court stated:

17          Here, the parties disputed the amount of insurance coverage  
 18          available and the amount of damage sustained. Once liability  
 19          was established, however, calculating the amount due required no  
 20          discretion—it equaled the invoices for the cleanup work  
 21          performed. The questions before the jury were simply ones of  
 22          liability and did not involve opinion or an exercise of discretion  
 23          regarding the amount of the award, as would be the case with  
 24          general damages. Weyerhaeuser factually established its costs

25          <sup>41</sup> Litho Color, Inc., 98 Wash. App. at 301, 991 P.2d 638.

<sup>42</sup> See Egerer v. CSR West, LLC, 116 Wash. App. 645, 67 P.3d 1128 (2003).

<sup>43</sup> Universal/Land Construction Co., 49 Wash. App. at 641, 745 P.2d 53 (Emphasis added).

<sup>44</sup> See Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wash.2d 654, 15 P.3d 115 (2000).

<sup>45</sup> Id.

<sup>46</sup> Id. at 686, 15 P.3d 115.

1           through the presentation of invoices. The date those invoices  
 2           were paid established the proper time interest began to run.<sup>47</sup>

3           Similar to Weyerhaeuser, the District's claim is also liquidated because the amount  
 4           TIG owes is supported by actual invoices and can be ascertained with exactness and without  
 5           reliance on opinion or discretion.<sup>48</sup> In determining how much prejudgment interest to award,  
 6           the Weyerhaeuser court held that prejudgment interest runs from the date the invoices were  
 7           paid.<sup>49</sup>

8           In addition, the court in Prier v. Refrigeration Engineering Co.,<sup>50</sup> held that the  
 9           prejudgment interest ran from the date the repairs were completed.<sup>51</sup> In Prier, the plaintiff  
 10          contracted for an ice rink. The refrigeration contractor breached the contract and was held  
 11          responsible for the cost to reconstruct the ice rink. The plaintiff argued that it was entitled to  
 12          prejudgment interest from the date the repairs were completed and the business reopened. The  
 13          Washington Supreme Court agreed and held that prejudgment interest should be calculated  
 14          when the principal amount due, by way of debt or compensation, is "sufficiently certain."<sup>52</sup>

15           Based on Weyerhaeuser and Prier, this Court should award prejudgment interest on the  
 16          amount TIG owes from the date of the invoices as documented by RGL's February 8, 2007  
 17          report. And, because RGL's report identifies every invoice the District paid over the course of  
 18          the four year restoration period, the parties can work backwards to identify the invoices and  
 19          costs incurred in the last \$30,397,225. Thus, the District can demonstrate when the  
 20          prejudgment interest begins to run for **each invoice**.

21  
 22          

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 47 Id.

23          48 See portions of RGL's February 8, 2007 report attached hereto as Exhibit C to Hoffman Decl.

24          49 See Weyerhaeuser Co., 142 Wash.2d at 686, 15 P.3d 115; Universal/Land Construction Co., 49 Wash. App. at  
 641, 745 P.2d 53.

25          50 74 Wash.2d 25, 442 P.2d 621 (Wash. 1968).

51 Id. at 34, 442 P.2d 621.

52 Id. at 34, 442 P.2d 621.

1        This Court will recall that the District advised the Court that it intended to file a motion  
 2 for prejudgment interest. And, on May 29, 2007, the Court instructed the District to submit that  
 3 motion by June 1, 2007. The Court will appreciate that quantifying the prejudgment interest  
 4 based on each invoice is a time consuming process. Accordingly, the District was **not** able to  
 5 complete this task in four days.

6        However, the District calculates the prejudgment interest is at least \$1,823,833. This  
 7 number represents the prejudgment interest for six months from December 13, 2006 (the date  
 8 the District produced RGL's final report to TIG<sup>53</sup>) to June 13, 2007 (the date of the hearing).<sup>54</sup>  
 9 But the District maintains that this amount will increase when the Court looks at invoices for all  
 10 expenses excess of \$95,000,000 that were incurred **prior to** December 13, 2006.

11       TIG characterizes the District's claim as "a moving target" and maintains that the  
 12 District is not entitled to prejudgment interest because it is unable to ascertain the amount  
 13 owed. However, TIG's argument lacks merit because the District only seeks prejudgment  
 14 interest on the amounts that have been **incurred** (i.e., the invoices were paid). And, once the  
 15 amounts have been incurred, the amounts owed are ascertainable and, therefore, "liquidated."  
 16 Equity and fairness dictate that this Court should find in the District's favor and award  
 17 prejudgment interest.

## 18       **V. Conclusion**

19       This Court has already determined that TIG wrongfully denied coverage for the  
 20 District's loss. As a result of TIG's breach the District:

- 21           • Had to cope with the double whammy of finding the financial resources to repair  
 22                 Swift No.2 and litigating a protracted and expensive coverage dispute for an  
 23                 unknown and indefinite period of time;

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24  
 25       <sup>53</sup> RGL subsequently revised its December 13, 2006 report on February 8, 2007, but these revisions do not affect  
             the prejudgment interest calculation.

<sup>54</sup> \$30,397,225 x 12% divided by 12 = \$303,972.25 interest per month x 6 months = \$1,823,833.

- 1     • Entered into an agreement with Lloyd's whereby the District agreed to give
- 2                 Lloyd's 40% of any recovery from Federated and TIG;
- 3     • Incurred more than two million dollars in attorneys' fees and expenses in
- 4                 proving coverage; and
- 5     • Had to engage in vexatious, time-consuming and expensive litigation with TIG.

6                 Washington case law and public policy dictate that the District should be made whole as  
 7 a result of TIG's contract breach. Case law and public policy also support this Court's award  
 8 of all damages required to put the District back in the financial position it would have been in  
 9 had TIG not breached the insurance contract.

10          In view of the foregoing, the District requests that the Court make the following  
 11 determinations:

- 12     • The District is entitled to recover all attorneys' fees and expenses.
- 13     • TIG is responsible for all other damages incurred as a result of TIG's contract
- 14                 breach. This includes the money the District will have to give to Lloyds from
- 15                 any TIG recovery.
- 16     • TIG's \$95,000,000 "credit" for the recoveries from Lloyd's and Federated
- 17                 should consider the \$9,261,340 cost to effect those recoveries. As a result, TIG
- 18                 owes \$39,658,565 and **not** just \$30,397,225 (\$30,397,225 + \$9,261,340 =
- 19                 \$39,658,565).
- 20     • The District is entitled to prejudgment interest on the \$30,397,225 (or
- 21                 \$39,658,566) that TIG owes.

22          For the Court's convenience, the District summarizes the relief requested below:

Category of Damage	Amount
Attorneys' fees and expenses for proving coverage (February 4, 2004 – July 2006)	\$1,655,083 <sup>55</sup>

25          <sup>55</sup> \$960,348 attorneys' fees + \$64,253 attorneys' expenses + \$629,881 expert and consultant fees = \$1,655,083.

1 Attorneys' fees and expenses for proving coverage (August 2006 – to date)	TBD
2 Cost to collect insurance proceeds from TIG	\$12,158,890
3 Costs to effect the \$95,000,000 recoveries	\$9,261,340
4 Prejudgment Interest prior to 12-13-2006	TBD
5 Prejudgment Interest after 12-13-2006	\$1,823,833 <sup>56</sup>
<b>PRESENT TOTAL</b>	
<b>\$24,899,146</b>	

6 WHEREFORE the District respectfully requests that this Court grant its Motion for  
 7 Attorneys' Fees, Prejudgment Interest and Other Damages Caused As a Result of TIG's Breach  
 8 of Contract.

9 DATED this 1<sup>st</sup> day of June 2007

10 Co-Counsel for Defendant PUD #1 of Cowlitz Co.

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56 The District maintains that this amount will increase when the Court looks at invoices for all expenses excess of \$95,000,000 that were incurred prior to December 13, 2006.

**CERTIFICATE OF ELECTRONIC FILING AND SERVICE**

I certify under penalty of perjury that on this date I served the foregoing document in the manner indicated on the persons identified below:

**DEFENDANT PUD'S MOTION TO FOR ATTORNEYS' FEES, INTEREST AND  
OTHER DAMAGES**

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( ) Mail  
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( ) Hand Delivery  
(X) CM/ECF system notice of electronic  
filing

Signed at Seattle, Washington, this 1<sup>st</sup> day of June, 2007.

s/ Michael E. Ricketts